IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.159 of 2006

Rajesh Vishnu Gawade
Hindu, aged 24 years, residing
at 9/2 Shivsagar, near Bhaji Market,
Bhatwadi, Ghatkopar (W)
Mumbai 400 086 ... Petitioner
(Brother of Detenu)

V/s

1. The State of Maharashtra
throughthe Secretary to
the Government of Maharashtra
Home Department (Special)
Mantralaya, Mumbai 400 032

2. Smt.Neela Satyanarayana,
Principal Secretary
(Appeals and security),
Government of Maharashtra,
Home Department (Special)
Mantralaya, Mumbai 400 032

3. The Superitnendent of Prison,
Mumbai Central Prison,

Arthur Road, Mumbai

4. The Superintendent of Prison,
Nashik Road Central Prison,
Nashik Road, Maharashtra

5. Secretary, Advisiory Board,
Mantralaya, Mumbai ...Respondents

Mr.V.N.Tripathi i/b M/s Lalla and Lalla for Petitioners
Mrs. A.S.Pai,APP for State

CORAM:S.B.MHASE &
S.R.SATHE,JJ.
DATED:30th Nov. 2006

ORAL JUDGMENT :- (Per S.R.Sathe,J.)

1. By this petition under Article 226 of the Constitution of India, the Petitioner is challenging the order of detention dated 16-12-2005 passed against his brother Santosh Vishnu Gawade by the Principal Secretary (Appeals and Security) Government of Maharashtra, Home Department and Detaining authority while exercising the powers under Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (52 of 1974) (hereinafter called COFEPOSA Act 1974)

whereby it was directed that Santosh Vishnu Gawade shall be detained.

2. The facts giving rise to this petition are as under:-

. As per information received by the Directorate of Revenue Intelligence (DRI), Chennai on 29-3-2005 it was revealed that 2 consignments of Red Sanders were illegally exported from JNPT (Jawaharlal Nehru Port Trust, Nhava Sheva) to Port Kelang vide shipping Bill Nos.3324021 dated 4-3-2005 and 3340360 dated 14-3-2005 by misdeclaring them as "Indian Fine Wheaten Flour". As a result of the same letter was sent to M/s Caravel Shipping Services Pvt.Ltd., the Shipping Line for the said containers to stop the delivery of the said containers at Singapore and recall the same to Mumbai, but M/s Caravel Shipping Services Pvt. Ltd. informed that both the containers have already been delivered. Then it was revealed that one more container was also sent by misdeclaring it as "Indian Fresh Suji" which was exported to Port Kelang, Malaysia. So the said container was also called back and accordingly it arrived at Mumbai Port to Fere Basin Custom Area, Mumbai Port Trust, Mumbai. When enquiry was made by DRI in respect of these consignments and statements of concerned persons viz. Subhash Sitaram Minde, Prakash Kiran Shah, Sameer Bodke and Santosh Gawade were

recorded, it transpired that Subhash Sitaram Minde and Santosh Gawade were actively engaged with smuggling activities by transporting, dealing and exporting the said goods by use of old documents and government seals. The Red Sanders would in any form i.e. raw, processed or in process are prohibited woods and same were not permitted to be exported. It revealed that Red Sanders, which is prohibited item was attempted to be exported or exported out of country by Subhash Minde and Santosh Gawade in contravention of the provisions of Import Export Policy. Santosh Gawade misdeclared the name of the exports, CHAs and discription of the goods in the shipping documents prepared for export of the same and held the shipping bills and thus the acts of commissions and omissions on the part of the Santosh Gawade were against the Import and Export policy and the Customs Act and the said goods were liable to confiscation under Section 113(d)(a) and (h) of the Customs Act and acts of Santosh Gawade were thus amounting to smuggling as defined in Section 2(39) of Customs Act, 1962 and as adopted in COFEPOSA Act, 1974.

3. The detenu Santosh Gawade was initially arrested on 5-4-2005. However, he was released on bail on 21-4-2005. When Sponsoring Authority found that Santosh Gawade was indulging smuggling activities a proposal was made for passing detention order against him and as such show cause notice was issued to him on 6-10-2005. After

considering the reply and all other necessary documents the detaining authority came to the conclusion that Santosh Gawade was knowingly involved in the pre-judicial activities and considering the nature and gravity of the offence and well organized manner in which Santosh Gawade was engaged in pre-judicial activities, the detaining authority was satisfied that unless detenu Santosh Gawade is detained he is likely to continue to engage in above mentioned smuggling pre-judicial activities in future. Hence the detaining authority passed the order of detention under COFEPOSA Act.

4. The above mentioned order of detention was served on the detenu along with grounds of detention on 7-12-2005. He was also informed about his right to make representation and copies of relevant documents and statements etc. to be considered and placed before the detaining authority were provided to detenu. He was also informed that his case will be referred to Advisory Board constituted under Section 8 of COFEPOSA Act 1974 and was further informed that if he so desires he can make representation to the Advisory Board against the detention order and he shall be heard in person by the Advisory Board in due course, if the Advisory Board considers it essential to do so or if he so desire.

5. The detenu thereafter produced written

representation dated 13-1-2006 before the Advisory Board wherein he also expressed that he be permitted to represent his case through his next friend. The Advisory Board heard the detenu and forwarded its information/report to State Government on 30-1-2006. After receipt of the said report the Additional Chief Secretary (Home) confirmed the order of detention against the detenu and confirmation order was also issued.

6. Being aggrieved by the detention order, the brother of detenu Santosh Gawade, filed the present writ petition challenging the detention order on several grounds. Though in petition several grounds were taken to challenge the detention order at the time of hearing of the petition, Shri Tripati, learned Advocate for the Petitioner has pressed into service only one ground which is stated in para 5(xi) which reads as under:-

> Para 5(xi) The Petitioner says and submits that in his representation submitted to the Hon'ble Advisory Board, the detenu had prayed to the Hon'ble Advisory Board that he may be allowed to be represented by a lawyer before the Hon'ble Advisory Board and in the alternative, he also prayed to the Hon'ble Board to allow him to be represented by a non lawyer friend or a relative. The said

prayers and prayers (f) and (g) in the representation of the detenu, a copy of which is annexed herewith and marked as Annexure D. The Petitioner says and submits the Hon'ble Advisory Board did not consider both the prayer even though the lawyer, the Petitioner and his father were present outside the Board room for being called to represent and argue the case of the detenu. The Petitioner says and submits that till date the detenu is not aware of the fate of his above prayers before the Hon'ble Advisory Board.

The Petitioner says and submits that the Hon'ble Board on the contrary allowed the High Ranking D.R.I. Officers to argue their case before the Hon'ble Board to justify the impugned order.

The Petitioner has been prejudiced by the above action of the Hon'ble Advisory Board. The Petitioner says and submits that the Hon'ble Advisory Board adopted a procedure which is arbitrary and therefore, the impugned order of detention has been rendered null and void".

7. Shri Tripati, learned Advocate for the Petitioner

submitted that though the detenu had specifically mentioned in his representation that he be given an opportunity to putforward his defence and submit his submissions through his friend before the Advisory Board, the Advisory Board did not allow him to produce his friend and thus his valuable right under Article 21 of the Constitution of India is denied to him and as such the order of detention is bad in law. In order to substantiate this proposition he has placed reliance on a case Vijay Changdeo Patil V Satish Sahney, Commissioner of Police, Greater Bombay and Ors. **1997 CRI. L.J. 185**, in that case the detenu had made a written request in his representation that he be allowed to examine his witnesses and witnesses were also kept ready outside the Board room but they were not called and examined. Under such circumstances the Division Bench of this Court held that it was enough and there was no need for detenu to make a written request during the interview that he wanted to examine witnesses. Mrs. Pai, learned APP strenuously argued before us that in the instant case there is no question of examination of any witnesses, the detenu had not made any such request. All that he had mentioned in his representation was that he be allowed to put up his case through his friend. According to her the detenu was also informed by Home Department that as per his request he can put up his case through friend. So, on the date of hearing before the Advisory Board the detenu ought to have kept his

friend present but he had not kept his friend present and so it cannot be said that detenu's valuable right has been infringed. It is true that detenu was informed that he can be represented through his friend, however, there is absolutely nothing on record to indicate that on the date when the detenu was produced before the Advisory Board his friend was not present as tried to be suggested by the Under Secretary, Home Department. In fact when the name of the friend who was to represent detenu was not disclosed and not informed to the concerned officer of Home Department how the said officer can say that friend of detenu was not present at that time. Such statement of officer is certainly not acceptable. Mrs.Pai, learned APP also submitted that if really the detenu had desire to be represented through his friend then he could have done so by informing accordingly to the Chairman or members of the Advisory Board but he has not done so. Moreover, according to her the Advisory Board after considering the representation of the detenu and the parawise remarks of the Department have submitted the report and as such it cannot be said that there is violation of Article 21 of the Constitution of India. It is true that normally if the detenu who is produced before the Advisory Board has desire to putforward his case through his friend then he would state accordingly to the Advisory Board. However, if we take into consideration the observations made by Their Lordships in the above cited ruling of Vijay

Changdeo Patil it appears that this Court has held that once the detenu has stated in his representation that he would like to examine witnesses then he need not make oral request to that effect during interview before the Advisory Board. Besides this we have carefully gone through the report of the Advisory Board which was made available to us by the learned APP during the course of hearing. From the perusal of the same it is very clear that there is nothing in the report which would indicate that the learned Advisory Board had in fact considered the request of the detenu that he be allowed to represent through his friend. Though we specifically asked the learned APP to point out any sentence from the report of the Advisory Board to show that the request of the detenu being represented by friend was considered, the learned APP could not point out the said position.

8. In view of the above, we are of the considered view that detenu had a right to be represented by a friend but detenu's request in that behalf made in his representation was not considered by the learned Advisory Board and denial of such right of detenu in fact amounts to non compliance with the procedure required to be adopted by the learned Advisory Board. Even in a case of **Abdul Zabbar V State of Rajasthan and Ors. (1984) 1 SCC 443** the Apex Court has observed that detenu has a right to be represented by a friend who is not legal practitioner - denial of such right would

amount to non-compliance with the procedure by the Board which would vitiate entire proceedings before it and render continued detention of the detenu illegal and as such it will have to be quashed.

9. In this view of the matter we pass the following order :-

. Writ petition is partly allowed and rule is partly made absolute.

. The continued detention of the detenu Santosh Vishnu Gawade is declared to be illegal as from 13-1-2006 and he is directed to be released forthwith if not required in any other case.

. Writ petition is disposed of accordingly.

(S.R.SATHE,J.) (S.B.MHASE,J.)